

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

INTELLECTUAL VENTURES I LLC and  
INTELLECTUAL VENTURES II LLC,

Plaintiffs/Counter-Defendants,

v.

CAPITAL ONE FINANCIAL  
CORPORATION; CAPITAL ONE BANK  
(USA), NATIONAL ASSOCIATION; and  
CAPITAL ONE, NATIONAL  
ASSOCIATION,

Defendants/Counter-Plaintiffs,

v.

INTELLECTUAL VENTURES  
MANAGEMENT, LLC; INVENTION  
INVESTMENT FUND I, L.P.; INVENTION  
INVESTMENT FUND II, LLC;  
INTELLECTUAL VENTURES FUND 83  
LLC, and JOHN DOES 1-2000,

Additional Counter-Defendants.

Civil Action No. 1:13-CV-00740-AJT-TCB

**CAPITAL ONE'S MEMORANDUM IN SUPPORT OF  
ITS MOTION TO COMPEL ANTITRUST DISCOVERY**

Capital One brings this motion to the Court in the context of the short time remaining for discovery under the current schedule. Despite Capital One's repeated demands for discovery, IV has unilaterally withheld all responses that it characterizes as being related to Capital One's antitrust claims and defenses. Absent a stay by the Court – which has been requested by IV but not granted by the Court – IV has no excuse for refusing to abide by its obligations under the Federal Rules of Civil Procedure, the Court's Local Rules, and the Orders entered by this Court. Indeed, given the very short period of time available for discovery in this jurisdiction, the Court expects the parties to move forward with discovery even while decisions on motions are pending. Accordingly, as set forth below, Capital One requests that the Court enter an order requiring IV to comply with its discovery obligations and respond to Capital One's discovery requests on an expedited basis.

## **I. STATEMENT OF FACTS**

Pursuant to the Joint Discovery Plan, Capital One filed and served its First Set of Requests for the Production of Documents on July 30, 2013 (the "First RFP" or "Request(s)").<sup>1</sup> On August 14, 2013, IV objected, refusing to produce most of the requested documents. Between August 29, 2013 and September 17, 2013, IV produced 1490 documents. On September 20, 2013, Capital One sent IV a letter detailing the deficiencies in IV's productions and responses. The parties met and conferred on September 26, 2013. Capital One served a Second Set of Requests for Production, Second Set of Interrogatories, and First Set of Requests for Admission on October 1, 2013. Also on October 1, 2013, IV notified Capital One that it

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<sup>1</sup> Capital One had not yet filed any antitrust claims or defenses in the case at this time, but sought general discovery for its patent and damages defenses. Many of these requests, however, are also relevant to proving the antitrust claims and defenses.

planned to serve supplemental responses to Capital One's first set of requests on October 7, 2013. IV instead provided supplemental responses on October 15, 2013.

In its supplemental responses, IV disregarded the counterclaims. Capital One immediately alerted IV to the deficiencies, including the lack of responses to requests that would provide support for the antitrust claims, in a letter dated October 17, 2013.<sup>2</sup> Capital One and IV held a meet-and-confer session to discuss these deficiencies on October 24, 2013. This meet-and-confer session was not productive, and IV continued to deny Capital One the documents Capital One needs to pursue its defenses and counterclaims. On October 25, 2013, IV unilaterally declared that it would not produce any antitrust related discovery—even though discovery had not been stayed in this case.

One week later, on October 31, 2013, IV filed a motion asking the court to stay discovery on the antitrust issues. Dkt. 112. Capital One filed an opposition to the motion on November 12, 2013. Dkt. 124. IV replied on November 14, 2013. Dkt. 132. The Court on November 15, 2013 postponed argument on IV's motion to Stay Discovery on Antitrust Issues. Dkt. 134. Later the same day, Capital One and IV held a meet-and-confer session regarding discovery. During that session, IV refused to produce any discovery related to the antitrust and patent misuse claims and defenses, even after Capital One reminded IV that the Court had not stayed discovery. On November 21, 2013, IV served objections and responses to the three requests in Capital One's Third Set of Requests for Production, once again ignoring the antitrust claims and defenses by stating that the information sought is not relevant to claims or defenses in this case.

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<sup>2</sup> This was not the first such letter to IV. On September 20, 2013, Capital One sent a letter to IV detailing the deficiencies with IV's initial response to Capital One's First RFPs. In a subsequent meet and confer, IV agreed to supplement its responses to Capital One's First RFPs, and it is those supplemental responses that in turn are the subject of Capital One's October 17, 2013 letter and subsequent meet and confer.

## II. ARGUMENT

Capital One is filing this motion to compel discovery on antitrust issues so that it can obtain the materials necessary to prove its claims and defenses and comply with the schedule set by the Court. While Capital One acknowledges that IV has filed a motion to dismiss the antitrust claims and more recently to stay discovery on antitrust issues, the Court has never explicitly stayed discovery of any kind in this case. Accordingly, Capital One must protect its rights to antitrust discovery if the Court intended to allow antitrust discovery to proceed pending the outcome of the aforementioned motions.

Because its stay motion has not been granted, IV has no excuse or justification for unilaterally refusing to participate in such discovery. Under Federal Rule of Civil Procedure 26, a party may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). IV nonetheless refuses to even discuss antitrust discovery and instead states that it will not produce any materials relating to the antitrust claims and defenses. The Court’s Rule 16(B) Scheduling Order, however, specifically prohibits these types of general objections to discovery requests except on the basis of privilege. See Dkt. 58 ¶ 1(c). Similarly, the local rules require objections to discovery be “specifically stated.” E.D. Va. Local Rule 26(C). IV’s general statement that it will not produce any antitrust-related discovery is improper absent direction from the Court staying discovery on these issues.

Moreover, IV has not sought, and the Court has not granted, a Protective Order that would relieve IV of its discovery obligations with respect to the antitrust discovery. Given that the discovery obligations under the Federal Rules of Civil Procedure (as well as the Court’s Local Rules) are mandatory absent entry of a Protective Order, IV’s failure to seek a Protective Order prior to its intentional violation of its discovery obligations should preclude IV from now, well after the fact, seeking permission for such clear misconduct.

### III. CONCLUSION

For the foregoing reasons, Capital One respectfully requests that the Court grant Capital One's motion to compel and order IV to produce non-privileged antitrust related discovery in response to Capital One's discovery requests. Alternatively, should the Court wish that antitrust discovery be stayed pending a ruling on IV's pending motion to dismiss the Amended Counterclaims, Capital One requests that the Court enter an order to that effect.

Capital One has noticed the hearing on the motion for the earliest available date pursuant to the order in this case, which is Friday, December 6, 2013, but believes that the motion can and should be resolved earlier and is willing to make itself available by telephone or in person at the Court's convenience.

Dated: November 22, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of November 2013, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the registered CM/ECF counsel listed below:

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